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7 **BEFORE THE POLLUTION CONTROL HEARINGS BOARD**
8 **STATE OF WASHINGTON**

9 AIRPORT COMMUNITIES COALITION,

PCHB No. 01-160

10 Appellant,

11 CITIZENS AGAINST SEATAC
12 EXPANSION,

ECOLOGY'S RESPONSE TO ACC'S
MOTION FOR SUMMARY
JUDGMENT REGARDING THE
ABSENCE OF A WATER RIGHT

13 Intervenor/Appellant,

14 v.

15 STATE OF WASHINGTON,
16 DEPARTMENT OF ECOLOGY; and
17 PORT OF SEATTLE,

18 Respondents,

19 **I. INTRODUCTION**

20 The Airport Communities Coalition (ACC) moves for summary judgment contending
21 that, as a matter of law, reasonable assurance is lacking in this case because Ecology did not
22 require the Port of Seattle (Port) to obtain a water right to implement its stormwater
23 management and low flow mitigation plans. The ACC's motion should be denied. A water
24 right is not necessary for Ecology to have reasonable assurance that water quality standards
25 will be met. Further, Ecology properly did not require the Port to obtain a water right in this
26

AR 005063

1 case because the Port's stormwater management and low flow mitigation plans do not involve
2 a beneficial use of water.

3 II. STATEMENT OF FACTS

4 The facts relevant to this motion previously have been set forth in declarations and
5 briefing filed by Ecology and the Port in response to the ACC's Motion for Stay. *See*
6 Declaration of Paul Fendt, Declaration of Ed O'Brien, Declaration of Ann Kenny, Declaration
7 of Kelly Whiting, Declaration of Joe Brasher, Ecology's Memorandum in Opposition to the
8 ACC's Motion for Stay, and Port of Seattle's Memorandum in Opposition to Motion for Stay.

9 In addition, the Port has submitted a revised low flow mitigation plan pursuant to
10 Condition I of the Clean Water Act § 401 Certification (§ 401 Certification).¹ The revised plan
11 estimates the project's impact on low flow in Walker Creek at .11 cubic feet per second (cfs)
12 and .08 cfs in Des Moines Creek. The plan estimates the impact to Miller Creek to be
13 completely offset by seepage from the third runway embankment. The Port proposes to retain
14 approximately 18.5 acre-feet of water for low flow offset to Walker Creek and approximately
15 13.5 acre-feet for low flow offset to Des Moines Creek.

16 III. AUTHORITY AND ARGUMENT

17 A. **Water Right Is Not Required In The Circumstances Of This Case For Ecology To 18 Have Reasonable Assurance That Water Quality Standards Will Be Met.**

19 The ACC's central contention in this motion is that the Port must have a water right for
20 its stormwater management and low flow mitigation plans in order for Ecology to have
21 reasonable assurance that water quality standards will be met. This contention is
22 fundamentally erroneous. Ecology has reasonable assurance that the project will meet water
23 quality standards by virtue of the conditions in the § 401 Certification. The grant of a water
24 right would not provide Ecology any additional or greater assurance that the Port's project will

25 ¹ The Port has indicated it intends to submit a declaration from Paul Fendt, and portions of the revised
26 low flow mitigation plan, in its response to the ACC's motion for summary judgment. To avoid duplication,
Ecology does not intend to submit another copy of the revised plan. The facts herein are taken from the revised
plan executive summary.

1 meet water quality standards above what the existing certification conditions already provide.
2 Thus, a water right is not necessary.

3 The § 401 Certification requires the Port to mitigate for impacts to streamflows in
4 Miller, Walker, and Des Moines Creeks. See § 401 Certification, Condition I. The Port's low
5 flow mitigation proposal, in conjunction with its stormwater management plan, provide that
6 stormwater collected from the site will be released to the creeks during the low flow periods.
7 First Fendt Decl., ¶¶ 7-10. The § 401 Certification requires the Port to carry out the mitigation
8 plan in perpetuity. See § 401 Certification, Condition B(1)(e). These conditions, by
9 themselves, provide Ecology with reasonable assurance that the project will meet water quality
10 standards with respect to low flow impacts.

11 The ACC contends that a water right is necessary for reasonable assurance because
12 only if such a right is granted can Ecology be certain that the water released by the Port will
13 remain in the streams. ACC's Motion at 9. ("The purpose of a water right in this instance is to
14 protect from impairment by others the instream flows in Des Moines, Miller and Walker
15 Creeks that the Port is required to create ...") This contention is incorrect for several reasons.

16 First, Miller, Walker, and Des Moines Creeks are closed to further appropriations and
17 have been closed since approximately 1950. WAC 173-509-040.² This closure precludes any
18 further appropriations from those water bodies. *Postema v. Pollution Control Hearings Board*,
19 142 Wn.2d 68, 95, 11 P.3d 226 (2000). Through its low flow and stormwater management
20 plans, the Port will route to the streams precipitation that, but for the construction of the
21 project, would have naturally flowed to those water bodies. Consequently, the Port's release of
22 stormwater to those streams will not add any water to the creeks above what is there now. If
23 water is presently not available for appropriation, the Port's stormwater releases will not alter
24 that condition. See *id.* at 95 (closure is administrative determination that water is unavailable

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26 ² The closure rule does not mention Walker Creek but since Walker is tributary to Miller, the closure
presumably applies to Walker Creek as well. See *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68,
95, 11 P.3d 226 (2000) (closure applies to water hydraulically connected to closed stream).

1 for appropriation.) Thus, Ecology has reasonable assurance that the mitigation plan will
2 succeed because the water released by the Port will remain in the streams due to the closure.

3 Second, even if Ecology granted the Port a water right, the right could not ensure that
4 the water released by the Port was free from appropriation. Senior appropriators, if any, could
5 take the water released by the Port notwithstanding the holding of a junior water right by the
6 Port. RCW 90.03.010 (“as between appropriators, the first in time shall be the first in right”).

7 Third, even if Ecology granted the Port a water right, it would be a right solely to
8 manage stormwater - something that has never before been required of a stormwater
9 management system in this state - it would not prevent future appropriation of the water in the
10 streams. The ACC essentially asserts that Ecology should grant the Port an instream flow right
11 in the streams, something Ecology cannot do. The issuance of such right to the Port would be
12 contrary to the legislative process established in RCW 90.22 for the establishment of instream
13 flows. Additionally, there is no factual basis on which to grant the Port an instream flow right
14 because the Port does not propose to establish an instream flow in the creeks. Rather, the Port
15 will manage stormwater in a manner that addresses the low flow impacts of its project.³

16 Historically, some courts refused to grant water rights for instream flow because, under
17 the common law, a valid appropriation of water required a “diversion” and application of the
18 water to beneficial use. *Colorado River Water Conservation Dist. v. Rocky Mountain Power*
19 *Co.*, 406 P.2d 298 (Colo. 1965). In response, legislatures in many states, including
20 Washington, passed statutes recognizing instream flows as beneficial uses. *See generally*,
21 A. Dan Tarlock, *Law of Water Rights and Resources* § 5.07(3) (1996); 2 *Waters and Water*
22 *Rights* § 13.05(a) (2001); RCW 90.54.020(1); RCW 90.03.005. In Washington, the
23 Legislature has established a procedure for the establishment of instream flows. *See*
24 RCW 90.22. This procedure requires Ecology to set instream flows via a public rulemaking

25 _____
26 ³ Ecology could grant a water right for a specific instream use, *see Bevan v. Ecology*, PCHB No. 48
(1972), but could not grant the Port a right to a suite of instream uses that amounts to an instream flow, which is
what the ACC proposes.

1 process. RCW 90.22.020. The Legislature has declared that Ecology's authority to establish
2 instream flows is "exclusive." RCW 90.03.247. Further, when an instream flow is created, it
3 is a right held by the state, not the individual. *See also* RCW 90.42.040 (requiring trust water
4 rights to be held by the state).

5 In other states, the existence of such an "exclusive" process has led the courts to
6 conclude that private parties may not appropriate water for instream flow purposes because to
7 do so would be contrary to the statutory scheme. Tarlock, *supra* at 5-35 ("The emerging rule
8 seems to be that private appropriation cannot perfect instream flow appropriations . . .");
9 *California Trout, Inc. v. State Water Resources Control Board*, 153 Cal. Rptr. 672, 675 (Cal.
10 App. 1979); *Matter of Application for Water Rights of County of Arapahoe*, 891 P.2d 952, 971-
11 72 (Colo. 1995). In *Arapahoe County*, for example, the court stated:

12 In enacting instream flow legislation, the General Assembly granted the
13 Colorado Water Conservation Board "exclusive authority" to appropriate
14 minimum stream flows in natural streams and minimum levels for natural lakes.
15 This legislation recognizes the need to protect the environment Thus, the
16 General Assembly has established a statutory mechanism whereby the state can
17 protect the interests that concern the cross-appellants.

18 891 P.2d at 971 (citations omitted); *see also* *Bevan v. Ecology*, PCHB No. 48 (1972) ("nor do
19 we regard this application as in any sense the establishment of a minimum flow by private
20 action").

21 Here, the ACC attempts to characterize the Port's stormwater plan and Ecology's § 401
22 Certification as establishing minimum instream flows in Miller, Walker, and Des Moines
23 Creeks. *See* ACC's Motion at 9. This mischaracterization leads the ACC to conclude that a
24 water right is needed because the Port's "use" for instream flow is beneficial and must be
25 protected from future appropriators. In fact, nothing in the Port's plan or the § 401
26 Certification establishes or purports to establish minimum instream flows in the streams.
Rather, the plan and the § 401 Certification require the Port to mitigate low flow impacts by
managing its stormwater system in a manner that provides for the release of water to mimic the

1 natural hydrologic regime.⁴ While the Port's releases are timed and measured to offset impacts
2 from construction of the Third Runway, the Port does not propose, nor does the § 401
3 Certification establish, any instream flow in Miller, Walker, or Des Moines Creeks.

4 Thus, if Ecology granted the Port a water right, that right would only be for the
5 operation of its stormwater management system, something that has never before been required
6 in this state. The water right would not be for minimum instream flows in the creeks.
7 Moreover, granting the Port a water right for stormwater management would add nothing to
8 the level of reasonable assurance provided by Ecology's § 401 certification because the water
9 right would not prevent future appropriations from the streams should the closure ever be
10 lifted. As stated above, the § 401 Certification conditions regarding low flow mitigation and
11 stormwater management provide reasonable assurance that water quality standards will be met
12 in the affected streams with respect to the project's impacts to streamflows.

13 Finally, the ACC argues that the Port must demonstrate that legal means are in place to
14 offset low flow impacts and such means can only be demonstrated with a water right. The
15 question here, however, is not whether the Port's proposal requires a water right in the abstract.
16 The question is whether Ecology has reasonable assurance that the project will meet water
17 quality standards. Despite the fact that there are numerous cases in Washington dealing with
18 stormwater, none has been found stating that a water right is required to collect or divert
19 stormwater. See, e.g., *Currens v. Sleek*, 138 Wn. 2d 858, 862-63, 983 P.2d 626 (1999); *Island*
20 *County v. Mackie*, 36 Wn. App. 385, 675 P.2d 607 (1984). This is because the cases, both in
21 Washington and other states, treat stormwater as an "enemy" to be disposed of rather than
22 used. See 2 *Waters and Water Rights* § 10.03 (2001).⁵ At common law, rainwater was
23

24 ⁴ There is no question that Ecology has authority to condition a § 401 certificate on such releases.
25 *Ecology v. P.U.D. No. 1 of Jefferson County*, 121 Wn.2d 179, 849 P.2d 646 (1993). The point here is that these
26 conditions do not amount to the establishment of a minimum instream flow. Also, it is worth noting that there is
no mention of a water right requirement in *Ecology v. P.U.D. No. 1 of Jefferson County*.

⁵ In Washington, the "common enemy doctrine" allows a landowner to do what the Port proposes here –
direct stormwater into natural drainways. *Currens*, 138 Wn.2d at 863.

1 generally considered to be outside the prior appropriation system. Note, Ginsburg, *Ownership*
2 *of Diffused Surface Waters In the West*, 20 Stan. L. Rev. 1205 (1968).

3 Given the absence of any authority on this point, Ecology reasonably concluded that the
4 Port did not need a water right to operate its stormwater management system or implement its
5 low flow plan. The Board should not overturn this decision. It would be unfair to both
6 Ecology and the Port for the Board to create a new rule of law in this case - that a water right is
7 required for stormwater management - and apply it retroactively. The Legislature should
8 determine whether the Port's activity requires a water right, not the Board. *Cf. Currens v.*
9 *Sleek*, 138 Wn.2d at 867 (refusing to discard the common enemy rule because to do so would
10 constitute "an abrupt break with past precedent"). The Board should deny the ACC's motion
11 for partial summary judgment.

12 **B. The Board's Summary Judgment Ruling In *Okanogan Highlands Alliance v.***
13 ***Ecology Is Not Applicable.***

14 The ACC further argues that the Board held in *Okanogan Highlands Alliance v.*
15 *Ecology*, PCHB No. 97-146, 182, 183, 186, 019 (2000), that a water right is required in order
16 for reasonable assurance to be present. The ACC cites the Board's 1998 summary judgment
17 ruling in *Okanogan Highlands* in support of this claim. *See* ACC's Motion at 9 ("The Board
18 previously has ruled that the capture, storage, and release of water as mitigation for impacts to
19 streamflow in the context of a § 401 certification requires a water right."). Despite the ACC's
20 assertions, the Board's ruling is not applicable to this case.

21 The Board's summary judgment ruling in *Okanogan Highlands Alliance* was not made
22 "in the context of a § 401 certification." That ruling was made in the context of appeals of
23 Ecology's water right decisions relating to the Crown Jewel Mine. *See Okanogan Highlands*
24 *Alliance, supra*, Final Decision and Order at Finding of Fact at 13. In fact, at the time the
25 summary judgment ruling was rendered, the § 401 certification had not been issued to Battle
26 Mountain Gold. *See* Findings of Fact at 28.

1 The streamflow mitigation plan at issue in *Okanogan Highlands Alliance* was not
2 developed for water quality purposes. Rather, it was required due to the water short nature of
3 the Myers Creek and Toroda Creek basins and because the creation of the mine would result in
4 a shift of the groundwater divide on Buckhorn Mountain. The streamflow mitigation plan at
5 issue in those cases was specifically required to address impairment to senior users and
6 instream values, not for reasonable assurance that water quality standards would be met by the
7 project. See *Okanogan Highlands Alliance, supra*, Final Decision and Order at Finding of
8 Facts at 4-8. Although the appeal of Ecology's water right decisions later was consolidated
9 with the appeal of the subsequent § 401 certification, the Board did not rule that a water right
10 must be granted for Ecology to have reasonable assurance. The issue of whether a water right
11 was needed for reasonable assurance was not raised in the appeal of the § 401 certification
12 issued for the Crown Jewel Project.

13 The full text of the Board's 1998 summary judgment ruling in *Okanogan Highlands*
14 *Alliance* states:

15 The board concludes that documented water right changes should be approved
16 and issued for implementing the post-reclamation portion of the streamflow
17 mitigation plan. Water right changes should be issued to clearly record the right
18 and priority of water necessary to implement the plan. Since this water would
19 be derived from existing rights held by Battle Mountain Gold Company,
20 granting these rights will relate back to the rights subject to review in this
proceeding and the commitment of those rights to serve the post-reclamation
mitigation plan. It is not necessary, therefore, for additional rights to be
obtained prior to construction and operation. Nor is it unlawful to approve the
new and changed water rights and the mitigation plan under the Water Code and
water Resources Act prior to the issuance of any necessary water right changes.

21 *Okanogan Highlands Alliance*, Summary Judgment on Stipulated Issues Nos. 20, 21 and 22 at
22 2.⁶

23 _____
24 ⁶ The summary judgment ruling addressed the following legal issues:

25 20. Whether additional water rights, beyond those approved by Ecology for the Crown Jewel
26 Project, are necessary to implement the post-reclamation portion of BMG's streamflow mitigation plan?

21. If so, whether BMG must obtain those water rights prior to commencing construction and
operation of the Crown Jewel Project?

22. If so, whether it is lawful to approve BMG's new and changed water rights and the
mitigation plan under the Water Code and the Water Resources Act?

1 The Board refers in the decision not to new water rights, but rather to “water right
2 changes.” The Appellants in that case contended that Battle Mountain Gold needed an entirely
3 new water right to appropriate water from the pit lake for discharge into the streams. The
4 Board rejected that contention, holding that “It is not necessary . . . for additional rights to be
5 obtained” The Board also rejected the Appellants’ contention that Ecology improperly
6 issued its water right decisions “prior to the issuance of any necessary water right changes.”
7 Thus, *Okanogan Highlands Alliance* does not stand for the propositions for which the ACC
8 cites it.

9 There are other distinguishing characteristics between this case and *Okanogan*
10 *Highlands Alliance* as well. First, the creeks involved there, Myers and Toroda, were not
11 subject to administrative closure. Findings of Fact at 4, 5. Second, the amount of water Battle
12 Mountain Gold was required to discharge to Myers Creek was based on an IFIM study.
13 Findings of Fact at 6. Thus, unlike this case, there was a need in *Okanogan Highlands*
14 *Alliance* to protect the streamflow augmentation from potential future appropriation, and an
15 intent to establish an instream flow in Myers Creek. Again, in this case, the Port intends only
16 to manage its stormwater in a way that mimics the pre-project hydrology. It does not intend to
17 establish an instream flow.

18 **C. A Water Right Is Not Required Here Because The Port Does Not Propose Any**
19 **Beneficial Use Of Water.**

20 The ACC argues that the Port’s low flow mitigation proposal requires a water right
21 because it involves an appropriation of public water for a beneficial use. According to the
22 ACC, the Port’s timed releases to Miller, Walker and Des Moines Creeks are a beneficial use
23 under the general principle that instream flows are beneficial. The flaw in this argument,
24 however, is that the Port is not proposing any instream flow nor does Ecology’s § 401
25 Certification establish any instream flows. The Port’s temporary detention and release of
26 stormwater is not a beneficial use, therefore, no water right is required.

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1 The requirement of beneficial use, as an element of a water right, is fundamental in
2 western water law. *Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997).
3 Beneficial use refers both to the purposes for which water may be used as well as the amount
4 necessary for a particular purpose. *Ecology v. Grimes*, 121 Wn. 2d 459, 463, 852 P.2d 1044
5 (1993). “Water can only be appropriated for a beneficial use and beneficial use is necessary to
6 hold an appropriative right.” Tarlock, *supra* § 5.16(1).

7 At common law, the diversion of water for drainage purposes was not considered a
8 beneficial use:

9 Where the question is simply one of drainage, water can not be appropriated.
10 Here the question is one as to how to get the water off the land and into the
11 stream or drainage system and get rid of it, and not how to get it from the stream
12 onto the land. There is also the lack of the intent to use the water for some
13 beneficial purpose, followed up by the actual use of the same. Water flowing in
14 a drainage ditch without any intention to recapture it is abandoned.

15 Kinney, *Irrigation and Water Rights* § 701 (2d Ed. 1912) (footnotes omitted).

16 In *Maeris v. Bicknell*, 7 Cal. 261 (1857), for example, the plaintiffs diverted water from
17 a swamp for the purpose of draining it. The Court held the diversion did not create a water
18 right because the water was not applied to beneficial use:

19 [I]t would seem clear that such actual appropriation must be for some useful
20 purpose allowed by law. In fact, merely turning the water from a claim with the
21 intention to dispense with its use, is no actual appropriation at all. It also
22 follows, from the same decision, that until such actual appropriation there can
23 exist no complete right to the use of the water

24 *Maeris*, 7 Cal. at 262-63.

25 Similarly, numerous cases state that mere diversion and storage of water is not an
26 appropriation. *Ickes v. Fox*, 85 F.2d 294, 298 (D.C. Cir. 1936) (applying Washington law);
Fort Lyon Canal Co. v. Amity Mutual Irrigation Co., 688 P.2d 1110, 1113 (Colo. 1984). The
reason for this rule is that a valid appropriation depends upon application of the water to
beneficial use. Tarlock, *supra* at § 5.09(1).

Under these authorities, the mere construction of impervious surface without any
stormwater management system does not require a water right, even if the impervious surface

1 diverts stormwater from creeks where it otherwise would go. In that case, there is no
2 beneficial use because the water diverted is simply drainage. Similarly, construction of
3 ordinary stormwater facilities, such as ponds and bioswales, which may delay rainwater from
4 reaching its destined stream, does not require a water right because the water is merely diverted
5 and temporarily stored. Once the water passes through the stormwater facility, it is again just
6 drainage.

7 The Port's proposal here is not different from either of these hypotheticals. The Port's
8 stormwater management system involves the diversion and temporary storage of stormwater in
9 vaults. It also involves drainage of the water from the vaults once it passes through the
10 stormwater system. Neither of these actions constitutes a beneficial use of water because they
11 are fundamentally nothing more than actions by the Port designed to "get the water off the land
12 and into the stream or drainage system and get rid of it." Kinney, *supra* at § 701.

13 The ACC contends that the Port's proposal differs from ordinary stormwater
14 management because the Port proposes to retain water in the system for up to six months, treat
15 it, and release it in a controlled manner to the streams. ACC's Motion, ¶ 11. Essentially, the
16 ACC contends that, because the Port is exercising greater dominion and control over its
17 stormwater than is usual, it must get a water right. This argument is erroneous. Dominion and
18 control are not relevant to whether a water right is needed. The relevant question is whether
19 the water is applied to beneficial use. Dominion and control, without beneficial use, cannot
20 establish a water right. *See Fort Lyon Canal Co.*, 688 P.2d at 1113.

21 The ACC also contends that the Port's stormwater management and low flow
22 mitigation plans "differ in kind" from ordinary proposals because they are designed for the
23 purpose of low flow rather than high flow mitigation. This is not a "difference in kind." High
24 flow mitigation is designed to ensure compliance with water quality standards just as is low
25 flow mitigation. High flows may increase turbidity, cause erosion, increase siltation, and
26 otherwise violate water quality standards. Proper stormwater management protects water

1 quality standards by reducing those peak flows. Mitigation for low flows also protects water
2 quality standards, such as temperature.

3 Although both high flow and low flow mitigation confer a “benefit” on streams by
4 protecting water quality standards, merely conferring a benefit does not amount to “beneficial
5 use.” Planting trees along a stream, for example, benefits the stream by providing shade and
6 large woody debris, but such activity does not amount to a beneficial use of water. Under the
7 ACC’s theory, planting trees along a stream would require a water right if done to protect
8 characteristic uses of the stream. The error in the ACC’s argument lies in contending that the
9 Port is “using” water from its stormwater system to establish an “instream flow” in the creeks.
10 In fact, the Port is not using the water in its stormwater system but is simply designing the
11 system in such a way as to protect water quality from both high flow and low flow impacts.
12 The Port also is not attempting to establish any instream flows in the creeks.

13 The ACC relies, in support of its arguments, on several of the Board’s previous cases
14 holding that credit may not be given to an appropriator for offsets resulting from removal of
15 vegetation and other mitigation measures. *See, e.g., L.G. Design, Inc. v. Ecology*, PCHB Nos.
16 96-20, 96-25 (1997); *Auburn School Dist. No. 408 v. Ecology*, PCHB No. 96-91 (1996). These
17 cases have no application here. All of them involved the question of whether a water right
18 should be granted, not the question of whether a water right was required in the first place.
19 Also, the validity of these cases under current law is questionable because the Legislature
20 amended RCW 90.03.255, after these cases were decided, to require Ecology to consider
21 mitigation measures in deciding water rights applications. *See* Laws of 1997, ch. 360, § 1.
22 This amendment is evidence of a legislative intent to reverse the holdings in those cases.

23 The determination of what constitutes a “beneficial use” of water is partly a policy
24 judgment. *See 2 Waters and Water Rights* § 12.02(c)(2) (2001); *see also In re Water Rights of*
25 *Deschutes River*, 286 P. 563, 577-78 (Or. 1930) (disallowing as wasteful a claim to use water
26 released from a dam for the purpose of carrying off debris because the water could be used for

1 irrigation instead); *Grimes*, 121 Wn.2d at 471-72. Here, sound policy dictates that no water
2 right is required because the Port has no intent to change the hydrologic regime in the creeks
3 that would warrant analysis under water right criteria. *See In re Alpowa Creek*, 129 Wn. 9, 15,
4 224 P.2d 29 (1994) (intent to apply water to beneficial use is critical element of an
5 appropriation). Thus, from a policy standpoint, the proper course is not to require a water
6 right. The Board should affirm Ecology's decision in this regard.

7 **IV. CONCLUSION**

8 For the reasons stated above, the ACC's Motion for Summary Judgment Regarding the
9 Absence of a Water Right should be denied.

10 DATED this 14th day of January, 2002.

11
12 CHRISTINE O. GREGOIRE
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13 

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AIRPORT COMMUNITIES COALITION,

PCHB No. 01-160

Appellant,

CERTIFICATE OF SERVICE

CITIZENS AGAINST SEA-TAC
EXPANSION,

Intervenor/Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY; and
PORT OF SEATTLE,

Respondents.

Pursuant to RCW 9A.72.085, I certify that on January 14th, 2002, I caused to be served Ecology's Response to ACC's Motion for Summary Judgment Regarding the Absence of a Water Right and this Certificate of Service, in the above-captioned matter to be served upon the parties herein, as indicated below:

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CERTIFICATE OF SERVICE

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- Overnight Express
- By Fax: 360.786.1835

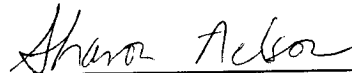
Richard A. Poulin
SMITH & LOWNEY
2317 E. John Street
Seattle, WA 98112

- U.S. Mail
- State Campus Mail
- Hand Delivered
- Overnight Express
- By Fax: 206.860.4187

the foregoing being the last known business addresses.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14th day of January, 2002, in Olympia, Washington.


SHARON NELSON
Legal Assistant

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